theories and methodologies

The Facts on the Ground

PETER BROOKS

THE FACTS ON THE GROUND: THAT IS WHERE INVESTIGATION STARTS, AND THAT IS WHAT THE COURT WILL HAVE TO DEAL WITH DURING THE trial. And beyond: if the case goes up to an appellate court, those facts will be retold in an effort to judge whether the law has been correctly applied to them—whether the facts were appropriately formalized, one might say. So the statement of facts is a genre within a genre, one that doesn't much interest legal scholars since it is supposed to be neutral, factual indeed—it's there so the more interesting legal work can go forward. But surely this genre within a genre is interesting in itself.

Let me start with a classic case from 1930, decided by the New York State Court of Appeals in an opinion written by its chief judge, Benjamin Cardozo. There has been a shooting in Brooklyn, and the victim is dead. As Cardozo states at the outset, "A crime is admitted. What is doubtful is the degree only." Then he gives us his account of the facts:

> Four young men, of whom Coppola was one, were at work repairing an automobile in a Brooklyn street. A woman, the defendant's wife, walked by on the opposite side. One of the men spoke to her insultingly, or so at least she understood him. The defendant, who had dropped behind to buy a newspaper, came up to find his wife in tears. He was told she had been insulted, though she did not then repeat the words. Enraged, he stepped across the street and upbraided the offenders with words of coarse profanity. He informed them, so the survivors testify, that "if they did not get out of there in five minutes, he would come back and bump them all off." Rejoining his wife, he walked with her to their apartment house located close at hand. He was heated with liquor which he had been drinking at a dance. Within the apartment he induced her to tell him what the insulting words had been. A youth had asked her to lie with him, and had offered her two dollars. With rage aroused again, the defendant went back to the scene of the insult and found the four young men still working at the car. In a statement to the police, he said that he had armed himself at the apartment with a twenty-five calibre automatic pistol. In his testimony at the trial he said that this pistol

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> had been in his pocket all the evening. Words and blows followed, and then a shot. The defendant kicked Coppola in the stomach. There is evidence that Coppola went for him with a wrench. The pistol came from the pocket, and from the pistol a single shot, which did its deadly work. The defendant walked away and at the corner met his wife who had followed him from the home. The two took a taxicab to Manhattan where they spent the rest of the night at the dwelling of a friend. On the way the defendant threw his pistol into the river. He was arrested on January 7, 1930, about two months following the crime.
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> (New York State, Court of Appeals, *People v. Zackowitz*)

No wonder Cardozo is considered one of the great legal stylists: this is quick; it's vivid; it's even funny. There is a kind of arch distance between the eminent jurist and the low-life characters in this Brooklyn brawl. In fact, the speed and concision of the narrative make Cardozo's point: that the conviction of Zackowitz for first-degree murder cannot stand. There was no premeditation, no malice aforethought, but simply a violent reaction to a provocation. The district attorney's efforts at trial to characterize Zackowitz as "a man murderously inclined," someone with a propensity to crime, cannot stand up to analysis.

The most telling line in Cardozo's opinion may be the stunning "The pistol came from the pocket, and from the pistol a single shot, which did its deadly work." You can imagine an animated cartoon version in which that pistol just rises from the pocket and shoots. No finger on the trigger. No agency. That's the point Cardozo insists on: the shooting was simply the result of a heated confrontation. The prosecution's claim that Zackowitz kept several weapons in his apartment is irrelevant, and also prejudicial. We are not to load a criminal defendant with "propensity evidence," tending to show he had a character that was bound to commit a crime. What is needed is proof specific to the act to be judged by the jury. In what may be the most important doctrinal line of his opinion, Cardozo states, "In a very real sense a defendant starts his life afresh when he stands before a jury, a prisoner at the bar." Zackowitz must be granted a new trial.

I think Cardozo gets it right in *Zackowitz*; there are other cases, such as the famous *Palsgraf v. Long Island Railroad*, where his concise and rapid narrative obscures rather than clarifies crucial facts on the ground, in order to reach a conclusion that many now find erroneous.[1] But his narrative of that night in Brooklyn virtually makes the rest of his opinion unnecessary. The way the story is told already shows that Zackowitz is innocent of premeditated homicide. Cardozo's opinion in *Zackowitz* bolsters the radical claim tossed off by Anthony Amsterdam and Jerome Bruner in their book *Minding the Law*. Amsterdam, a lawyer, and Bruner, a psychologist, declare that the traditional supposition that the law could proceed by "examining free-standing factual data selected on grounds of their logical pertinency" has been supplanted: "increasingly we are coming to recognize that both the questions and the answers in such matters of 'fact' depend largely upon one's choice (considered or unconsidered) of some overall narrative as best describing *what happened* or *how the world works*" (111).

Agreed, but I don't think many lawyers or judges recognize that their choice of narrative determines the selection and alignment of the facts on the ground. "Just the facts" remains the accepted legal common sense, and little analytic attention is paid to the orderings that shape the facts into a plot, into an intelligible and significant narrative. I have written elsewhere about the sole Supreme Court opinion that addresses the role of narrative in the presentation of facts, the majority opinion written by David Souter in *Old Chief v. United States,* but even there Souter's acute analysis of what he calls "narrative integrity" is set aside in a ruling that finds too

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much narrative to be dangerous (Brooks, "Inevitable Discovery" and "Clues").[2] According to Souter, linking the present alleged crime to a defendant's past criminal activity may "overpersuade" a jury by convincing it that Old Chief, just like Zackowitz, is someone with a propensity for murder (United States, Supreme Court, *Old Chief v. United States* 181). In its insistence that the act, not the person, be judged, the law generally finds life stories both irrelevant and pernicious.

Yet Amsterdam and Bruner's statement rings true and could be illustrated by many more cases than those of Zackowitz and Old Chief. Any courtroom lawyer knows that the jury must be presented with a coherent story of what happened, and that story is likely to take a conventional form, with standard motivations, acts, and outcomes. It cannot be otherwise, since we live in a world of stories and account for everyday life, especially our own lives, in narrative form (Bowlby). Making facts into meaningful plots is one of the tools we use to deal with what happens to us and around us. As novelists have always known, and as psychologists have known at least since Freud, the lack of a more-or-less coherent narrative of one's life indicates psychic blockage, confusion, and the inability to understand one's identity. In his case history of Dora, Freud famously writes that his patient's first account "may be compared to an unnavigable river whose stream is at one moment choked by masses of rock and at another divided and lost among shallows and sandbanks" (15). If one were to ban narrative from the courtroom, there could be no more verdicts. Crime and punishment both demand stories.

It is strange that the law has not (that one opinion by Souter to the contrary) seen the need to articulate and formalize its understanding of narrative and the rules of storytelling, both in the courtroom and then in appellate opinions, where the story that has imposed itself at trial is retold by the judges who determine whether the legal rules have been followed, whether constitutional rights have been violated, whether the facts have been correctly presented to the jury. This retelling in a court of appeals, which can take us up several levels—finally, in the big cases, to the Supreme Court—is full of interest to the analyst of narrative since it reveals how the telling shapes the told. A number of Fourth Amendment "search and seizure" cases make the point since a search is by its nature narrative. The question in *Florida v. Jardines* (2013), for instance, is whether the use of a trained dog brought onto the porch of a house to sniff for marijuana violates the Fourth Amendment's ban on "unreasonable" searches. Here is Antonin Scalia for the majority:

> In 2006, Detective William Pedraja of the Miami-Dade Police Department received an unverified tip that marijuana was being grown in the home of respondent Joelis Jardines. One month later, the Department and the Drug Enforcement Administration sent a joint surveillance team to Jardines' home. Detective Pedraja was part of that team. He watched the home for fifteen minutes and saw no vehicles in the driveway or activity around the home, and could not see inside because the blinds were drawn. Detective Pedraja then approached Jardines' home accompanied by Detective Douglas Bartelt, a trained canine handler who had just arrived at the scene with his drug-sniffing dog. The dog was trained to detect the scent of marijuana, cocaine, heroin, and several other drugs, indicating the presence of any of these substances through particular behavioral changes recognizable by his handler. (United States, Supreme Court, *Florida v. Jardines* 1)

In contrast, see the version of the story told by Samuel Alito, dissenting:

> According to the Court . . . the police officer in this case, Detective Bartelt, committed a trespass because he was accompanied during his otherwise lawful visit to the front door of respondent's house by his dog, Franky. Where is the authority evidencing such a

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> rule? Dogs have been domesticated for about 12,000 years; they were ubiquitous in both this country and Britain at the time of the adoption of the Fourth Amendment; and their acute sense of smell has been used in law enforcement for centuries. (Alito 1)

Bartelt and his faithful dog Franky have every right to come visiting on Jardines's front porch. How can Scalia be so upset about it? And the argument goes on, Alito invoking customary visits to one's front door—by a mail carrier, by Girl Scouts selling cookies (1, 4)—and Scalia invoking the violation of "curtilage," the area around the home in which one can have a reasonable expectation of privacy (5). *Curtilage* derives from the Anglo-French *curtillage*, enclosed land belonging to a house, and from the Old French *cortillage*, kitchen garden, from *cortil*, garden, which derives from the Latin *cohort*/*cohors*, farmyard ("Curtilage"; "Curtilage, *N*."). We are dealing with an ancient sense of private space, which Scalia finds was trespassed by the sniffing Franky. Scalia's insistence on trespass leads Elena Kagan, who concurs in his opinion, to write separately in order to foreground another story: the more general one of the invasion of privacy, a story that Scalia wishes to avoid because of its possible far-reaching consequences in other matters (abortion rights, for instance) but that Kagan sees as much more important than the property trespass at the center of Scalia's story.

The three divergent opinions by Scalia, Kagan, and Alito are of course concerned—as Supreme Court opinions always are—with precedent: using and setting it. When we talk about searches and seizures, precedents almost always take the form of stories: they are narrative templates of what can and cannot be allowed by the Fourth Amendment bar on "unreasonable" searches and seizures. A search inevitably involves a story, and so an analysis of the search's legality inevitably becomes a piece of narrative analysis. The distinction between reason and unreason depends on how actions are enchained in a narrative.

Another recent case that tells a story about search and seizure is *Utah v. Strieff* (2016). A narcotics officer, Douglas Fackrell, was staking out a house in South Salt Lake City on the basis of an anonymous tip that drugs were being dealt there. When the defendant, Edward Strieff, left the house after a short visit, Fackrell stopped him. He then

> requested Strieff's identification, and Strieff produced his Utah identification card. Officer Fackrell relayed Strieff's information to a police dispatcher, who reported that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell then arrested Strieff pursuant to that warrant. When Officer Fackrell searched Strieff incident to the arrest, he discovered a baggie of methamphetamine and drug paraphernalia. (United States, Supreme Court, *Utah v. Strieff* 2)

At trial, the prosecution conceded that the "stop" of Strieff was illegal: there was no known arrest warrant, no probable cause, no consent to be searched. But the drug evidence was allowed on the grounds that the discovery that a valid arrest warrant existed (for a wholly different incident) "attenuated" the illegality of the search. The Utah Supreme Court had reversed the original decision, but the United States Supreme Court, in an opinion written by Clarence Thomas, reinstated Strieff's conviction on the grounds of the attenuation provided by the warrant.

This story is then retold by an angry Sonia Sotomayor, in her dissenting opinion:

> The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights. Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers

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> a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant. Because the Fourth Amendment should prohibit, not permit, such misconduct, I dissent. (1)

Sotomayor rewrites Thomas's narrative of an officer's honest mistake redeemed by the discovery of an outstanding arrest warrant as the story of an apocalyptic future (itself something of a genre in judicial opinions). If you understand Thomas's story fully, according to Sotomayor, you will see that it produces a dystopian future in which citizens are routinely bullied during illegal police stops, which are justified retrospectively by outstanding warrants that, she goes on to note, are terrifyingly common in this country: "The Department of Justice recently reported that in the town of Ferguson, Missouri, with a population of 21,000, 16,000 people had outstanding warrants against them. . . . In Newark, New Jersey, officers stopped 52,235 pedestrians within a 4-year period and ran warrant checks on 39,308 of them."

By the end of her opinion, Sotomayor brings the Fourth Amendment stories into real-life American communities, especially those of minority groups, and in doing so evokes some of the most powerful narratives written about race and class:

> This case involves a *suspicionless* stop, one in which the officer initiated this chain of events without justification. As the Justice Department notes, . . . many innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone's dignity can be violated in this manner. See M. Gottschalk, Caught 119–138 (2015). But it is no secret that people of color are disproportionate victims of this type of scrutiny. See M. Alexander, *The New Jim Crow* 95–136 (2010). For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. See, *e.g.,* W. E. B. Du Bois, *The Souls of Black Folk* (1903); J. Baldwin, *The Fire Next Time* (1963); T. Coates, *Between the World and Me* (2015).
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> By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged. (12)

Sotomayor has upped the ante of the story of Strieff's arrest, and in doing so she has immensely widened the narrative circle, so to speak. She has made this one case speak to the larger American tragedy of racial inequity, oppressive policing, and mass incarceration of minority citizens. Though she did not win the argument in *Utah v. Strieff,* her story continues to resonate well beyond the confines of the case. And perhaps someday it will be cited in a case with a more enlightened and comprehensive result.

Supreme Court narratives are of special importance because they not only set precedent but also shape reality definitively, through the police power of the state. "It is so ordered," the opinion of the court typically concludes, sending people to prison, even to execution, or else freeing them from the constraint of legal process. The narratives told—retold—at the highest appellate level possess a performative force. "It is so ordered": the story as we have told it orders reality with finality. This is what happened—thus, and no other way. Dissenters of course are free to protest, to claim that the majority's narrative is false or, more commonly—like Sotomayor's dissent in *Strieff*—that it covers up a truer narrative, possibly a potential one, that will in

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the future be our nightmare. The facts on the ground may not themselves be malleable, but once they are narrativized—as they must be if they are to be intelligible—their shape may prove protean. Their shaping will depend on how you think the world works, on how you think people behave, on what seems to you a well-formed narrative that produces conviction—pun intended.

Notes

1. *Palsgraf* concerns the injuries suffered by Helen Palsgraf on a Long Island Railroad platform when a man boarding a moving train, aided by a railroad employee, dropped a package of fireworks onto the track, where they exploded. According to Cardozo, "[t]he shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues." Cardozo decides that the Long Island Railroad cannot be found liable for Palsgraf's injuries: they were not foreseeable (New York State, Court of Appeals, *Palsgraf v. Long Island Railroad*). More recent torts doctrine would find that the costs of the accident should have been borne by the railroad. And in any event, it seems that Cardozo's narrative of the falling scales was implausible: Palsgraf must have been injured by the stampeding crowd (not mentioned at all in his opinion) put in motion by the explosion.

2. The question in *Old Chief* is whether a defendant can "stipulate" to a past crime without having the prosecution present it in detail, as was done at trial. The majority of the Supreme Court says yes—the prosecution, which normally is allowed to present the case as it sees fit, is not allowed to use past convictions to aggravate the defendant's actions in the present case. Along the way to this decision, Souter recognizes the need for the prosecution to be able to tell a full story, one with "narrative integrity" and no missing chapters (United States, Supreme Court, *Old Chief v. United States* 183). But the defendant's prior crime is not part of this story; it's part of another one.

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